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No. 96 -- _____

In The

Supreme Court of the United States

October Term, 1996

DAVE BIDDULPH and TAX CAP COMMITTEE,

Petitioners,

vs.

SANDRA MORTHAM, SECRETARY OF STATE OF FLORIDA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals, Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH W. LITTLE
Counsel of Record *
3731 N.W. 13th Place
Gainesville, Florida 32605
(352) 392-2219
Attorney for Petitioners

63 pp

QUESTION PRESENTED FOR REVIEW

The court below held that a citizen's exercise of a right reserved in a state constitution to petition the people of a state for a vote to adopt or reject an initiated amendment to the state constitution does not invoke the First Amendment "right to petition the Government for a redress of grievances." 89 F.3d at 1497. This decision poses this question for this Court:

Does a citizen's petition to the people of a state for a vote to adopt or reject an amendment to the state constitution proposed by a constitutionally prescribed citizen's initiative invoke the protections provided by the First Amendment right to petition the Government for a redress of grievances?

Stated differently, the question is, when the people of a state exercise their ultimate sovereignty to amend the state constitution by voting upon petitions proposed by citizen's initiatives, do the people constitute "the Government" under the petition clause of the First Amendment?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners Dave Biddulph and Tax Cap Committee were appellants in the United States Circuit Court of Appeals, Eleventh Circuit, in the proceedings below. Hereinafter, Petitioners are referred to as PETITIONERS.

The State of Florida, in the person of Sandra Mortham, Secretary of State of Florida, was appellee in the proceedings below

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Florida Constitution Cited:

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ORDER BELOW

The Order to be reviewed is:

Biddulph v. Mortham, 89 F.3d 1491 (11th Cir., August 1, 1996), rehearing and suggestion for rehearing en banc denied, __ F.3d _ (11th Cir., October 1, 1996)

STATEMENT OF JURISDICTION

(i) Date of Entry of Judgment to be Reviewed:

October 1, 1996

(ii) Reliance on Rule 12.3:

None

(iii) Statutory Provision Believed to Confer Jurisdiction on the Court:

28 U.S.C. § 1257

(iv) Constitutional and Statutory Provisions Involved:

First Amendment, United States Constitution:

Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.

Ninth Amendment, United States Constitution:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained *by the people*. (Italic added).

Tenth Amendment, United States Constitution:

The powers not deligated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*. (Italics added.)

STATEMENT OF CASE

Facts Material to the Questions Presented

The single question addressed to this Court is: Does a citizen's petition to the people of a state for a vote to adopt or reject an amendment to the state constitution proposed by a constitutionally prescribed citizen's initiative invoke the protections provided by the First Amendment right to petition the Government for a redress of grievances?

Stated differently, the question is, when the people of a state exercise their ultimate sovereignty to amend the state constitution by voting upon petitions proposed by citizens' initiatives, do the people constitute "the Government" under the petition clause of the First Amendment?

The answer to this question is critical to the theory of American constitutional governance. If the First Amendment does not prevent government from imposing extra-constitutional restrictions on the exercise of the petition-initiative process that effectively deny access to the ballot, then government may with impunity deny the people of their right to exercise their ultimate sovereignty guaranteed by the United States Constitution. United States Constitution, Preamble and Amendments IX and X.

The Florida Constitution is the basic governing instrument of Florida law. As have the people in at least 18 states, The Book of States 1994-1995 (Council of State Governments), p.294, the people of Florida have reserved to themselves the power to initiate amendments to the Florida Constitution by petitioning the people of the state

for a referendum on proposed amendments. Article XI §3 Florida Const. The people in a number of other states have reserved the power to themselves to initiate or recall statutes by referendum. The Book of the States 1994-1995, p. 294. The reserved constitutional right of the citizens of Florida to petition the people of the state for a vote on a constitutional amendment proposed by initiative is limited by the constitution only by the requirements that petitioners obtain a designated number of signatures of registered Florida voters within a prescribed geographical distribution, and, that each initiated amendment contain but one subject and matter properly connected therewith. Article XI, § 3 Florida Const. The concluding step in a citizens' initiated petition is a referendum in which the people vote to adopt or reject the proposed constitutional amendments. This constitutionally prescribed power to amend the state constitution by initiative and referendum is a specific application of the more general theory of governance found in Article I § 1 Florida Constitution; i.e., "All political power is inherent in the people." This is an expression of the ultimate political sovereignty of "the people," which is guaranteed by the Preamble and Amendments IX and X of the United States Constitution.

In this exercise of ultimate sovereignty, the citizens of Florida may act without the assistance or concurrence of the departments of Florida government, and may also do so against the express opposition of those departments. Nevertheless, in addition to the foregoing constitutional prerequisites to the right to petition for referenda on initiated constitutional amendments, the Florida legislature has imposed statutory requirements upon the language used in ballot titles and summaries. § 101.161 Fla. Stat. To satisfy these requirements, a citizen-petitioner must

submit a proposed constitutional initiative to the Florida Secretary of State prior to beginning the collection of signatures on petitions. The Florida Supreme Court also imposes restrictions upon referenda ballot language to prevent what it perceives to be deceiving and misleading language, *Askew* v. *Firestone*, 421 So.2d 151, 156 (Fla. 1982), and has often imposed these extra-constitutional standards after all other constitutional and legislative standards have been satisfied.

PETITIONERS' First Amendment claim derives from the extra-constitutional requirements the departments of state government (i.e., the Legislature and the courts) have placed upon the exercise of the constitutional right to petition the people for a vote upon initiated constitutional amendments. PETITIONERS have raised no objection to the content of these extra-constitutional requirements. Instead, what PETITIONERS challenge is the arbitrary application of these requirements by the departments of state government in a manner that effectively denies the right to petition and does so at the expense to petitioners of great unrecoverable costs in time, effort and money. In short, by imposing the extra-constitutional requirements in an arbitrary manner, the departments of state government have denied access to the ballot and defeated PETITIONERS' attempt to petition the people of Florida to exercise their sovereign right to adopt or reject an initiated amendment to the state constitution. The facts are as follows:

In 1993, in compliance with the statutory requirements mentioned above, PETITIONERS submitted a petition form to the Florida Secretary of State to initiate a proposed amendment to the Florida

constitution known as Voter Approval of New Taxes. Obtaining the Secretary of State's approval as to the format of an initiated amendment is a statutory prerequisite that must be complied with before a citizen may commence collecting signatures on petitions. § 101.161 Fla. Stat.

On August 3, 1993, the Florida Secretary of State approved the format of the Voter Approval of New Taxes initiative petition and authorized PETITIONERS to commence collecting signatures.

In the ensuing 12 months PETITIONERS gathered more than 400,000 certified signatures of registered voters from throughout Florida. Both the number of signed petitions and their geographic distribution within the state satisfied the constitutional prerequisites to petition the people of Florida for a vote to adopt or reject the proposed amendment.

PETITIONERS expended thousands of hours of effort and hundreds of thousands of dollars to obtain the constitutionally prescribed number of signed and verified petitions required to invoke a vote of the people. To comply with the constitutional prerequisites PETITIONERS also paid the supervisors of elections in the counties of Florida more than $25,000 to verify the signatures on the petitions.

In July 1994 PETITIONERS submitted more than 400,000 verified petitions to the Florida Secretary of State. The Secretary of State (i) ascertained that PETITIONERS had obtained a sufficient number of verified signatures to petition the Florida voters for a referendum on the Voter Approval of New Taxes amendment, (ii) certified that the

ballot title and summary complied with the statutory requirements, and (iii) certified the initiative for placement on the November 8, 1994 general election ballot.

Thereafter, the Florida Attorney General petitioned the justices of the Florida Supreme Court for an advisory opinion as to whether the Voter Approval of New Taxes initiative satisfied the constitutional and statutory requirements for ballot position. This procedure, which is prescribed by Article IV Section 10 Florida Constitution, was invoked only after PETITIONERS has incurred the massive expenditures in time, effort and money stated above.

On October 4, 1994 the justices rendered an advisory opinion that the Voter Approval of New Taxes initiative did not comply with the statutory ballot title and summary requirements. (The justices rendered no opinion on the constitutional one-subject requirement.) *Advisory Opinion to The Attorney General Re Tax Limitation*, 644 So.2d 486 (Fla. 1994). This advisory opinion was rendered fifteen months after the Florida Secretary of State had approved the Voter Approval of New Taxes initiative as to format and after PETITIONERS had expended thousands of hours of effort and hundreds of thousands of dollars to comply with the constitutional prerequisites. It was rendered three months after the Florida Secretary of State had certified the initiative for ballot position in the November 8, 1994 election, and one month before the election. This Court has recognized that requirements of this kind as to ballot language may be imposed at the beginning of the process (i.e., at the time the petition is approved as to format). See, *Meyer* v. *Grant*, 486 U.S. 414, 108 S.Ct. 1886, 1889, 100 L.Ed.2d. 425 (1986)

(explaining the Colorado process).

On October 5, 1994 the Florida Secretary of State ordered the Florida county supervisors of elections to remove the Voter Approval of New Taxes initiative from the November 8, 1994 general election ballot, despite the earlier certification.

On October 14, 1994 PETITIONERS filed a petition for writ of mandamus in the Florida Supreme Court seeking an order to the Florida Secretary of State to revise the Voter Approval of New Taxes ballot title and summary language to satisfy the requirements of the advisory opinion referred to above, and to restore the Voter Approval of New Taxes initiative to the November 8, 1994 ballot with the modified ballot title and summary.

The petition for writ of mandamus asked for a remedy that made no change in the content of the initiated amendment but merely modified the language of the ballot title and summary to avoid any confusion or deception. That this is an appropriate remedy to cure ballot language deficiencies and one employed in other states was acknowledged in the advisory opinion. 644 So.2d at 497 (Overton and Grimes, J.J. concurring.) Nevertheless, the Florida Supreme Court denied the petition for writ mandamus on November 2, 1994.

On October 27, 1994 PETITIONERS commenced this action in the United States District Court for the Northern District of Florida seeking a temporary restraining order to direct the Florida Secretary of State to conform the Voter Approval of New Taxes ballot language to the requirements of the advisory opinion referred to above and to restore the proposal to the

November 8, 1994 ballot. PETITIONERS' theory was and remains that the First Amendment requires the departments of state government to employ the least restrictive remedy to satisfy their purposes. In this case a less restrictive remedy would have been to modify the ballot language to remove the perceived defects prior to the vote. This remedy is readily available to the departments of state government, would cost them little or nothing, and would satisfy their objectives. It was also acknowledged to be an appropriate remedy in the advisory opinion. *Id.*

On November 2, 1994 the district court denied temporary relief and authorized PETITIONERS to file this action to seek permanent relief.

On November 8, 1994, the general election was conducted in Florida and PETITIONERS and the signers of more than 400,000 petitioners were denied the right to petition the Florida electorate for a vote to adopt or reject the proposed Voter Approval of New Taxes amendment to the Florida Constitution.

On November 21, 1994 PETITIONERS filed this action for permanent relief. In part, PETITIONERS maintained that the government's application of extra-constitutional prerequisites to ballot access in a manner that denied the right to petition for an election on an initiated constitutional amendment, when readily available remedies to the government's objections existed, abridged PETITIONERS' right to petition the Government for a redress of grievances. The district court denied relief on July 14, 1995.

The court below affirmed the district court's order

denying relief, and held that PETITIONERS' attempt to petition the people of Florida for a referendum on an initiated proposal to amend the state constitution did not invoke the First Amendment's guarantee of the right to "petition the Government for a redress of grievances." *Biddulph*, 89 F.3d at 1497. It is to obtain review of that holding that this petition is filed.

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED

Does a citizens' petition to the people of a state for a vote to adopt or reject an amendment to the state constitution proposed by a constitutionally prescribed citizens' initiative invoke the protections provided by the First Amendment right to petition the Government for a redress of grievances?

Stated differently, the question is, when the people of a state exercise their ultimate sovereignty to amend the state constitution by voting upon petitions proposed by citizens' initiatives, do the people constitute "the Government" under the petition clause of the First Amendment?

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. FOCUS ON THE FACTS

A brief comparison of the facts of *Meyer* v. *Grant*,

486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) and those of this case focusses the issue. In both Colorado and Florida the people have reserved the right in their state constitutions to petition the people of the states for initiated amendments to the state constitution. In both states the people have placed constitutional prerequisites upon a citizen's right to invoke this process, including specifically the requirement that a designated large number of the registered voters of the state must sign petitions before the initiated amendments may be placed on the ballot for a vote by the people. In Colorado, the departments of state government placed an extra-constitutional restriction on the exercise of the initiative-petition process by forbidding sponsors to pay collectors to obtain signatures of registered voters. This extra-constitutional requirement was challenged in *Meyer* v. *Grant*. Although, *Meyer,* acknowledged that the Colorado initiative petition process was not created by the United States Constitution, 108 S.Ct. at 1889, it also acknowledged that the manner in which proponents go about acquiring the signatures of registered voters on petitions invokes the free speech clause of the First Amendment and exacting scrutiny. 108 S.Ct. at 1891. *Meyer* also held that the extra-constitutional requirements the Colorado departments of government had placed upon the exercise of the petition-initiative process could not survive strict scrutiny.

This case involves substantive extra-constitutional requirements that the Florida departments of state government apply on the initiative petition process. PETITIONERS submit that these requirements are applied in an arbitrary manner to deny the right to petition the people for a vote on a proposed constitutional amendment despite the fact that effective remedies exist

to satisfy the government's interests. The First Amendment right invoked here is the guarantee "to petition the Government for a redress of grievances." PETITIONERS submit that the Florida departments of government abridge that right by imposing extra-constitutional requirements upon the wording of ballot titles and summaries that they will not approve until *after* petitioners have satisfied all the constitutional prerequisites and by providing no remedy to cure perceived defects except to deny access to a vote by the people.

In this case PETITIONERS expended thousands of hours of effort, twelve months, and hundreds of thousands of dollars to satisfy all the constitutional requirements and to obtain certified ballot position. Only then, did the departments of state government make a binding application of their extra-constitutional ballot language requirements. And, after finding some ballot language defects, the departments of state government refused to remedy them prior to the election but instead removed the proposed amendment from the ballot. This not only arbitrarily denied ballot access and the right to petition the Government for a redress of grievances but also extracted a very high and unrecoverable price from PETITIONERS from having made an unsuccessful attempt. This unrecoverable high price imposes a chilling effect upon the exercise of the right to petition in Florida.

B. ARGUMENT

PETITIONERS have challenged the manner in which the departments of state government have implemented extra-constitutional requirements upon the exercise of the petition-initiative on the grounds that it

abridges their right "to petition the Government for a redress of grievances." The Court below held that "state initiative processes do not involve the sort of petitioning that is guaranteed by the Petition Clause." *Biddulph*, 89 F.3d 1491 (11th Cir. 1996). PETITIONERS submit that this holding is contrary to the dictates of the First Amendment and should be corrected by this Court because of the extreme importance the people of the United States place upon the right to petition the people of a state for votes on initiated amendments to state constitutions.

The importance of the right of a citizen to petition the people of a state for a vote on an initiated state constitutional amendment is demonstrated both by the large number of initiatives voted upon by state electorates throughout the United States in the November 5, 1996 general election and by the intense public attention that focused upon them. In that election the people in twenty states throughout the nation voted on 90 initiated state referenda pertaining to a variety of important issues. See, e.g., New York Times, Nov. 7, 1996, B-7; Wall Street Journal, Nov. 7, 1996, A17. These included four measures in Florida. Also included was one measure in Arkansas that the people of that state were permitted to vote upon only because a justice of this Court interceded to stop state interference that would otherwise have blocked the referendum. *Arkansas Term Limits* v. *Donovan*, _ U.S. _, 117 S.Ct. 380, _ L.Ed.2d _ (1996), *Priest* v. *Donovan*, _ U.S. 117 S.Ct. 380, _ L.Ed.2d _ (1996).

The citizens' initiative process for amending state constitutions is embedded in the core of American governance. The truth of this is proved not only by the large number of hotly debated initiatives voted upon in

1996 but also by the large number of cases in which this Court and the Justices have been required to resolve perceived conflicts between the substance of initiated state constitutional measures and the restrictions on state power imposed by the United States Constitution. See, e.g., *Romer* v. *Evans*, _ U.S. _, 116 S.Ct. 1620, _ L.Ed.2d _ (1996)(discrimination against homosexual persons); *U.S. Term Limits, Inc.* v. *Thorton*, _ U.S. _, 115 S.Ct. 1842, L.Ed.2d _ (1995)(term limits on members of Congress); *Montanans For a Balanced Federal Budget Committee*, 469 U.S. 1301, 105 S.Ct. 13, 85 L.Ed 1 (1984)(balanced budget amendment); *Washington* v. *Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896(1982)(initiated statute pertaining to school busing); *Crawford* v. *Board of Education*, 450 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982) (initiated amendment and statute pertaining to busing); *Chapman* v. *Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975) (initiated amendment pertaining to reapportionment); and, *James* v. *Valtierra*, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971)(initiated amendment pertaining to rent control); *Reitman* v. *Mulky*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967) (initiated amendment pertaining to restrictions on the sale of real estate); and, *Pacific States Telephone & Telgraph Company* v. *State of Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912)(use of initiative-referendum is a political question).

As noted above, this Court has held that the free speech clause of the First Amendment is invoked when citizens attempt to exercise a state constitutional right to petition the people for a vote on an initiated amendment to a state constitution. *Meyer* v. *Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)(holding that a state may not forbid proponents of an initiative to hire workers

to obtain signatures on petitions forms). PETITIONERS raise the equally important question of whether a state may impose arbitrary, costly and unnecessary extra-constitutional requirements upon the exercise of the right to petition the people for a vote on an initiated constitutional amendment in a manner that effectively denies access to the ballot. PETITIONERS respectfully submit that if state government are permitted to bar the access of initiated petitions to the ballot despite the guarantee of the petition clause of the First Amendment and the constitutional acknowledgement in the Ninth and Tenth Amendments of the ultimate sovereignty of the people, then the basic sovereignty of the people will have been subverted to the dictates of government.

The court below opined, in effect, that because the right to petition the people of a state for a vote on an initiated amendment to a state constitution is not created by the United States Constitution, it is not protected by the First Amendment. *Biddulph*, 89 F.3d at 1496. That opinion ignores the fact that few specific expressions of political and civil rights are created by the United States Constitution. A primary purpose of the Bill of Rights and, indeed, of the entire Constitution, is to prevent governments from abridging rights that exist independently of the United States Constitution. For example, the great bulk of the occasions under which the right to vote is acknowledged in the states is not created by the United States Constitution. Yet, this Court has repeatedly held that once a state creates a right to vote in an election of general interest, First Amendment guarantees attach. The fact that the right to vote on the specific occasion was not itself a federal right is irrelevant. See, e.g., *Hill* v. *Stone*, 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975). Similarly, although this Court has never held "that the

States are required to establish avenues of appellate review," it has repeatedly held that "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *M.L.B.* v. *S.L.J.*, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __ (1996).

PETITIONERS respectfully submit that the sovereignty of the people is the most basic tenet of American constitutional governance. PETITIONERS also submit that, although not created by the United States Constitution, a state created constitutional right to petition the people of a state for a vote on an initiated proposal to amend a state constitution is the most basic expression of the sovereignty of the people. If the *right to vote* on all state issues of general importance is a fundamental right protected by the First Amendment, then *a fortiori*, the *right to petition the people* for a vote on initiated constitutional amendments is a fundamental right protected from arbitrary abridgment by the First Amendment right to petition Government for a redress of grievances. No right is excluded from constitutional protection merely because the United States Constitution did not create it.

The technical "legal" issue raised by this petition is whether the *people of a state*, in exercising ultimate sovereignty to adopt or reject an initiated amendment to a state constitution, constitute "*the Government*" in terms of the First Amendment right "to petition the Government for a redress of grievances." It will be the work of the brief on the merits to prove that point. Nevertheless, several basic points can be made at this point. One is that the United States Constitution begins with the words, "*We the people* of the United States.... do ordain and establish

(Italics added.) This statement may not be dismissed as mere precatory language but must be taken as an expression of ultimate sovereignty. This is in fact supported and enhanced by the Bill of Rights. Amendment IX states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained *by the people*." (Italics added). And in like manner, Amendment X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." (Italics added.)

These guarantees in the United States Constitution plainly acknowledge that ultimate political sovereignty in the United States is reserved in "the people." Moreover, Amendment X explicitly acknowledges that "the people" may reserve powers independent and distinct from the powers of "the states" qua states. In many states, including Florida, one such a reservation of the power of the people is the reservation of the right of citizens to petition the people of a state for a vote on an initiated proposed amendment to a state constitution.

In keeping with the preamble to the United States Constitution and Amendments IX and X thereto, the Florida Constitution begins with the words, "All political power is inherent in the people." Article I § 1 Florida Constitution, which is an expression of ultimate sovereignty found in the constitutions of most of the states. And in further keeping with their reserved sovereignty, the people of Florida have reserved to themselves the petition-initiative right which is the subject of this cause. Article XI Section 3 Florida Const.

From an historic perspective the people of this Country have exercised ultimate sovereignty virtually from the time of the Country's beginning. For example, the people making law in town meetings is an ancient and important element of American governance, especially in New England. See, e.g., Sly, Town Government in Massachusetts, (Harvard Press 1930). This must be acknowledged as government by the people acting as "the Government" within the meaning of the First Amendment. It is also nothing new that departments of government sometime wish to stifle the people in their exercise of ultimate right to make laws and policy. History records, for example, that many town meetings in Massachusetts fanned the flames of liberty in the 1770s by adopting resolutions calling for a declaration of independence and doing so against the desires of the Royal governors. Sly, supra., pp. 98,99. History also records that in 1744 the British Parliament adopted a statute to limit the powers and jurisdiction of town meetings in the Massachusetts colony for the purpose of ending the production of resolutions supporting independence. Geo. III. c. 45. See also, Sly, supra. History finally reports that this attempted suppression did not quell the spirit of liberty, but indeed may have helped incite the very event it was intended to quash, the Declaration of Independence of 1776.

Although it will be the job of the brief on the merits to establish the detailed history and use of initiatives and referenda in the United States as expressions of "Government" by direct act of the people, PETITIONERS respectfully submit that the petition clause guarantee protects their exercise, even if the use of these forms initially blossomed after the First Amendment was adopted. Telegraphy, radio, television and cybernets have all be invented and employed after the First

Amendment was adopted. Yet, this Court has never for an instant considered that the free speech clause of the First Amendment does not apply to the new forms of speech as they are created. *A fortiori*, the petition clause of the First Amendment must apply to all forms of the exercise of the powers of "the Government" as they are created and employed by the people. Making the basic law of a state through the initiative referenda procedure reserved by the people in a state constitution must certainly be acknowledged to be a form of "the Government."

II. THE DECISION OF UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT CONFLICTS WITH THE SENSE IF NOT THE HOLDING OF A RELEVANT DECISION OF THIS COURT.

Finally, the opinion below conflicts with the sense, if not the holding, of this Court's decision in *Cammarano* v. *United States*, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed. 462 (1959). *Cammarano* held that a business's expenditures made to defeat an initiated proposal to amend the constitution of the state of Washington by the petition-referendum process were not tax deductible. In *Commarano*, this Court explained its holding to deny deductibility of these expenditures, as follows:

> We think that initiatives are plainly 'legislation' within the meaning of these Regulations. Had the measures involved in these cases been passed by the people of Washington and Arkansas they would have had the effect and status of ordinary laws in every respect. The Constitutions of the

> States of Washington and Arkansas both explicitly recognize that in providing for initiatives they are vesting legislative power in the people. Every court which has considered the question has found these provisions to be fully as applicable to initiatives and referendums as to any other kind of legislation. See Revere Racing Ass'n v. Scanlon, supra; Old Mission Portland Cement Co. v. Commissioner of Internal Revenue, 9 Cir., 69 F.2d 676, affirmed on other issues, 293 U.S. 289, 55 S.Ct. 158, 79 L.Ed. 367; Mosby Hotel Co., v. Commissioner, decided October 22, 1954, P--H 1954 TC Mem.Dec. 54, 288; McClintock-Trunkey Co. v. Commissioner of Internal Revenue, 19 T.C. 297, reversed on other issues 9 Cir., 217 F.2d 329 ...

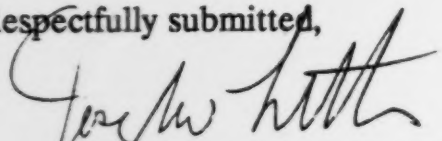
358 U.S. at 505, 79 S.Ct. at 529, 3 L.Ed.2d 462 (1959). (Underlining added.) Plainly, *Cammarano* acknowledges that the people, in making law, constitute "the Government." *A fortiori*, when amending a state constitution by petition, the people constitute "the Government." This is wholly consistent with this Court's steadfast holding that whether or not to employ direct lawmaking through the initiative petition process is a political question to be decided by the states. *Pacific States Telephone & Telegraph Company* v. *State of Oregon*, 233 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912).

CONCLUSION

PETITIONERS respectfully submit that both the gravity of this issue, as one of fundamental importance to

American governance, and the apparent conflict with *Commanaro* and the cases it cites, justify review of this case by this Court.

Respectfully submitted,



Joseph W. Little
Attorney for Petitioners
3731 N.W. 13th Place
Gainesville FL 32605
352-392-2211

APPENDIX A

Opinion of the Court Below

APPENDIX A

Dave BIDDULPH, Tax Cap Committee, Plaintiffs-Appellants,

v.

Sandy MORTHAM, Florida Secretary of State, Defendant-Appellee.

No. 95-3131
Non-Argument Calendar.

89 F.3d 1491 (11th Cir. August 1, 1996),
rehearing and suggestion for rehearing en banc Denied,
___F.3d___(11th Cir. October 1, 1996)

PER CURIAM:

I. Introduction

Appellant Dave Biddulph is a proponent of "Voter Approval of New Taxes," an initiative proposal to amend the Florida Constitution to prohibit the imposition of any new state or local taxes except upon voter approval. Appellant Tax Cap Committee ("Tax Cap"), formed by Biddulph, is the initiative proposal's official sponsor committee. "Voter Approval of New Taxes" was ultimately excluded from the ballot for failure to comply with Florida requirements governing the substance and titles of amendments proposed by initiative. Appellants contend that Florida's initiative process violates their First and Fourteenth Amendment rights because Florida's process is not "narrowly tailored." Appellants argue that instead of simply excluding the proposed amendment from the ballot, Florida could provide initiative proposal sponsors an opportunity to correct the title and language of deficient proposals. This is a case of first impression in this circuit. We hold that state initiative regulations, like

the ones in this case, that do not burden "core political speech," are content-neutral, and do not disparately impact particular political viewpoints are not subject to strict scrutiny under the First Amendment.

II. Florida's Constitutional Amendment Initiative Scheme

A. Substantive Requirements

Florida's Constitution gives the "people" the power to propose amendments to the state constitution. Fla. Const. art. XI, s 3. Until November 1994, the Florida Constitution required that amendments proposed by initiative address a single subject and that initiative petitions be signed by some percentage of the electorate: The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight per cent of the votes cast in each of such districts, respectively and in the state as a whole in the last preceding election in which presidential electors were chosen. Fla. Const. art. XI, s 3 (West 1993). In 1994, after Biddulph's proposed amendment was removed from the ballot, Florida voters approved a constitutional amendment that excepted from the single-subject requirement of Article XI, Section 3, any revisions or amendments limiting the power of government to raise revenue. See Fla. Const. art. XI, s 3 (West 1995).

A Florida statute further requires that initiative proposal sponsors write and submit in clear and unambiguous language (1) an "explanatory statement" or

"substance" of the amendment, not to exceed 75 words, describing the chief purpose of the measure and (2) a title, not to exceed 15 words. The substance and title alone appear on the ballot. Fla.Stat.Ann. s 101.161 (West Supp.1996).

B. Procedure for Initiative Approval

Before an initiative petition may be circulated for signatures, the proposal's sponsor must register as a political committee and submit the petition form to the secretary of state for approval. Fla.Stat.Ann. s 100.371(3) (West 1982). The secretary of state, through the Division of Elections, evaluates the petition format but does not review the text of the proposed amendment or its ballot summary and ..le to determine whether they comply with the constitution's single subject requirement and s 101.161. Fla.Stat.Ann. s 100.371(3) (West 1982); Fla.Admin.Code Ann. r. 1S- 2.009(1) (1996). If the proposed initiative amendment petition format is deemed sufficient by the Division of Elections, the sponsor may circulate petition forms for signatures. Fla.Admin.Code Ann. r. 1S-2.009(2) (1996). After collecting the signatures, the sponsor must submit the signed petition forms to the appropriate supervisor of elections who, upon payment of a fee equal to the sum of ten cents per signature checked or the actual costs of checking each signature, verifies the signatures on the petition forms and submits a certificate to the secretary of state indicating the total number of signatures checked, the number deemed valid, and the geographical distribution. Fla.Stat.Ann. s 100.371(4) (West Supp.1996), Fla.Stat.Ann. s 99.097(4) (West Supp.1996). If the secretary of state determines that the sponsor has obtained the constitutionally required number of signatures with the appropriate geographical distribution, certification of ballot position will be issued to the sponsor. Fla.Admin.Code Ann. r. 1S-2.0091(4).

The secretary of state must then submit the sponsor's initiative petition to the attorney general, Fla.Stat.Ann. s 15.21 (West 1988), who in turn must petition the Florida Supreme Court for an advisory opinion regarding the compliance of the text of the proposed amendment with the single subject requirement of Art. XI, s 3 of the state constitution and the compliance of the proposed ballot title and substance with s 101.161. See Fla.Stat.Ann. s 16.061 (1995); see also Fla. Const. art. IV, s 10 (requiring attorney general to request supreme court's opinion regarding validity of any initiative petition). If the state supreme court finds either that the proposed amendment violates the single-subject requirement or that the proposed ballot title or summary is ambiguous, the supreme court will order removal of the initiative petition from the ballot. See, e.g., In re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination, 632 So.2d 1018, 1021 (Fla.1994).

III. Facts

In 1993, Biddulph registered Tax Cap as sponsor committee for the proposed "Voter Approval of New Taxes" amendment. In August 1993, the Secretary of State approved Biddulph's initiative petition format. Biddulph then circulated the petition in an attempt to place the proposed amendment on the November 1994 ballot. Less than a year later, Biddulph submitted the signed petition forms to the supervisor of elections, who verified the signatures and transmitted the certificates to the Secretary of State. The Secretary of State certified the proposed "Voter Approval of New Taxes" amendment for a ballot position in the November 1994 election.

Pursuant to Florida law, the Secretary of State submitted the initiative proposal to the attorney general, who sought an advisory opinion from the supreme court on the legal sufficiency of the proposal. Over two months

later, and only a month before the 1994 election, the supreme court issued an opinion concluding that Biddulph's proposed amendment was legally insufficient for two reasons: it violated the constitutional single-subject requirement, and it violated s 101.161 because its title was misleading. Advisory Opinion to Attorney to Attorney General re Tax Limitation, 644 So.2d 486, 491-94 (Fla.1994). The Secretary of State then directed the supervisors of elections to remove Biddulph's amendment proposal from the ballot.

Nine days later, Biddulph filed a petition for a writ of mandamus asking the Florida Supreme Court to order the Secretary of State to eliminate the deficiencies in the title and summary of Biddulph's initiative proposal and to place the revised language on the ballot for the November 1994 election. The supreme court denied the petition. [FN1] Biddulph then filed this action in federal court, pursuant to 42 U.S.C. s 1983, against the Secretary of State. The district court, concluding that Biddulph had failed to state a claim, dismissed his case.

IV. Discussion

A. Mootness

Although the November 1994 election has passed, this case is not moot. Biddulph's signed and verified petition forms are valid in Florida for four years after the date the signatures were affixed to the forms. Fla.Stat.Ann. s 100.371(2). The signatures were collected in either 1993 or 1994, so Biddulph's verified petition forms are valid at least through 1997. Therefore, were we to order the state to revise the ballot title and or amendment language to comply with state law as Biddulph requests, Biddulph's proposed amendment presumably could be placed on the ballot in an upcoming election.

The Secretary of State contends that this case is moot on other grounds: the single subject requirement of

Article XI, Section 3 no longer applies to initiative proposals, that like Biddulph's, involve revenue measures, and the Florida Supreme Court recently issued an opinion granting ballot access to a previously-excluded revenue amendment as a result of that change. See Advisory Opinion to the Attorney General Re Tax Limitation, 673 So.2d 864 (1996) ("Tax Limitation II "). The implication of the Secretary of State's motion is that Biddulph's proposed amendment will likewise be deemed legally sufficient and granted ballot access. Neither the amendment to Article XI, Section 3 nor Florida's decision in Tax Limitation II renders this case moot, however. The supreme court had originally denied ballot access to the proposed amendment at issue in Tax Limitation II only because it violated the single subject requirement. Advisory Opinion to Attorney to Attorney General re Tax Limitation, 644 So.2d 486, 491 (Fla.1994). In contrast, the court excluded Biddulph's "Voter Approval of New Taxes" proposal not only because it violated the constitutional single subject requirement but also because it violated the clear ballot title requirement of Fla.Stat.Ann. s 101.161. 644 So.2d at 491-94. Because the court had an alternative basis for denying ballot access to "Voter Approval of New Taxes," the Florida Supreme Court need not, as it did in Tax Limitation II, revisit its decision to exclude the proposed amendment from the ballot. Thus, there is no reason to believe that the Florida Supreme Court will reverse its decision to exclude Biddulph's proposal from the ballot, and the controversy remains alive.

B. Biddulph's claim

Biddulph seeks strict scrutiny of Florida's initiative regulations. He argues that the United States Constitution requires Florida to narrowly tailor any restriction it imposes upon the initiative petition process and to avoid unnecessary impediments. He also contends that such

restrictions must serve a compelling state interest. [FN2] Although Biddulph admits that judicial review of proposed amendments for legal sufficiency is permissible, he points to two aspects of the initiative process that, he claims, are overly and unnecessarily burdensome. Biddulph contends that delaying judicial review for legal sufficiency until after petition circulation injects unnecessary risk into the process. Furthermore, Biddulph argues, the Florida Supreme Court has failed to provide clear and objective standards governing the legal sufficiency of initiative proposals. The result, according to Biddulph, is that initiative sponsors must complete Florida's costly and time-consuming initiative requirements [FN3] without any assurance that the supreme court will ultimately deem their initiative proposals legally sufficient for ballot inclusion. In other words, entering Florida's initiative process is a financial gamble for initiative proposal sponsors. The deterrent effect of the risk involved, according to Biddulph, is constitutionally impermissible because it burdens protected First Amendment activity without being narrowly tailored to meet a compelling government interest.

Biddulph asks this court to remedy the alleged constitutional defect in the initiative process by requiring Florida "to more narrowly tailor" its regulatory initiative process by providing a procedure either for revising initiative proposal language deemed legally insufficient or for review of a proposal's legal sufficiency before petition circulation. We must determine whether Biddulph has stated a constitutional claim and what constitutional right is at stake.

C. The Right to Petition the Government for Redress of Grievances

According to Biddulph, Florida's initiative process impermissibly infringes his First Amendment right "to

petition the government for redress of grievances," applicable to the states through the Fourteenth Amendment. U.S. Const. amend. I. Biddulph cites only two right-to-petition cases in his brief, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). These cases hold that the Petition Clause protects people's rights to make their wishes and interests known to government representatives in the legislature, judiciary, and executive branches. Noerr Motor Freight, Inc., 365 U.S. at 138-41, 81 S.Ct. at 530-31, Trucking Unlimited, 404 U.S. at 508-12, 92 S.Ct. at 611-12. See also McDonald v. Smith, 472 U.S. 479, 481, 105 S.Ct. 2787, 2789, 86 L.Ed.2d 384 (1985) (noting that James Madison in congressional debate on petition clause made clear that people have the right to communicate their will through direct petitions to the legislature and government officials). Biddulph's cursory reference to these two cases, however, does not explain the relevance to the voter initiative processes of the right to make wishes known to government representatives. After all, in the initiative process people do not seek to make wishes known to government representatives but instead to enact change by bypassing their representatives altogether. We are aware of no case that has held that state initiative regulations implicate the "right to petition the government for redress of grievances." Moreover, scholarship on the issue explains that state initiative processes do not involve the sort of petitioning that is guaranteed by the Petition Clause. [FN4] We need not reach this issue here, however, because Biddulph has not relied on Petition Clause case law in any substantive way in making his arguments to this court; to the contrary, Biddulph acknowledges that the right to propose

legislation through initiative is state-created. [FN5]

Biddulph's constitutional claim is best construed as based upon freedom of speech. Biddulph relies primarily on Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), and Delgado v. Smith, 861 F.2d 1489 (11th Cir.1988), cert. denied, 492 U.S. 918, 109 S.Ct. 3242, 106 L.Ed.2d 589 (1989), for the proposition that once states establish a citizen initiative process, the right to advocate for political change through the process is protected by the Petition Clause. Neither case refers to the Petition Clause. Meyer and Delgado involve only the First Amendment's proscription against laws abridging freedom of speech. Because Biddulph's claim is similar to the free-speech claims addressed in Delgado and Meyer, and because it does not implicate the Petition Clause, we will construe it as a free-speech claim.

D. Freedom of Speech and State Initiative Mechanisms

Biddulph's substantive argument is that Meyer and Delgado stand for the proposition that statutes burdening the right of voters to invoke the initiative process impinge upon core political speech and therefore are subject to strict First Amendment scrutiny. Neither case, however, requires us to subject a state's initiative process to heightened First Amendment scrutiny simply because the process is burdensome to initiative proposal sponsors. The cases do say that heightened First Amendment scrutiny should be applied to certain state regulations of ballot initiatives, but they distinguish between regulation of the circulation of petitions--which is "core political speech"-- and a state's general initiative regulations, the type Biddulph is contesting.

1. Meyer v. Grant

In Meyer, proponents of an initiative proposal challenged a Colorado law making it a felony to pay initiative petition circulators. The Court agreed with

Colorado that the right to place a citizen initiative proposal on the ballot is a state-created right (and thus, by implication, not a right guaranteed by the First Amendment). Meyer, 486 U.S. at 423, 108 S.Ct. at 1893. Nevertheless, the Court determined that the circulation of initiative petitions and the concomitant exchange of political ideas constitutes "core political speech." Id. at 422, 108 S.Ct. at 1892. The Meyer Court then applied strict scrutiny to the Colorado law and concluded that in criminalizing professional petition circulation Colorado had impermissibly hindered citizens' exchange of ideas about political change without sufficient justification. Id. at 422-28, 108 S.Ct. at 1892-95.

The Meyer Court did not examine Colorado's initiative process as such. Rather, the Court indicated that a state, though generally free to regulate its own initiative process, is limited in the extent to which it can permissibly burden the communication of ideas about the political change at issue in an initiative proposal that occurs during petition circulation. Id. at 423-27, 108 S.Ct. at 1893-94. [FN6] Biddulph does not complain that exclusion of his initiative proposal limited discussion during petition circulation of whether there should be voter approval of new taxes. [FN7] Instead, Biddulph protests the burdens of an unpredictable state initiative process on his ability to get an initiative proposal on the ballot. But Meyer does not require us to subject a state's initiative process to strict scrutiny in order to ensure that the process be the most efficient or affordable. Absent some showing that the initiative process substantially restricts political discussion of the issue Biddulph is seeking to put on the ballot, Meyer is inapplicable.

2. Delgado v. Smith

In Delgado v. Smith, 861 F.2d 1489 (11th Cir.1988), Spanish-speaking voters sought to enjoin

Florida from placing on the ballot an initiative proposal to make English the official state language. The plaintiffs argued that the proposal's sponsors failed to comply with a provision of the Voting Rights Act requiring that certain jurisdictions subject to rules prohibiting discrimination against language minorities provide "materials or information relating to the electoral process" in the minority group's language as well as English. 861 F.2d at 1491 (citing 42 U.S.C.A. s 1973aa-1a(c) (1981 & Supp.1988)). Six Florida counties were subject to this provision of the Act. The initiative sponsors failed to circulate both English and Spanish copies of the petition in Florida counties covered by the provision. The Delgado court concluded that Congress had not intended the Voting Rights Act's two- language requirement to govern Florida's initiative petition circulation process. Id. at 1492-93. Consequently, the court did not rely on any First Amendment ground in arriving at its decision.

The Delgado court went on to say in dicta, however, that "serious First Amendment questions ... would be raised" if the court were to adopt the appellants' view that the Voting Rights Act's minority language provisions applied to Florida's initiative petition circulation process. Meyer 's characterization of initiative petition circulation as "core political speech" counseled caution before imposing a federal requirement on petition circulation. Id. at 1495.

The Delgado court wrote, "[A]ny degree of governmental hindrance upon the freedom of a given group of citizens to pursue the initiative petition process with whomever, and concerning whatever they choose must be viewed with some suspicion." Id. at 1494. The Delgado court did not, however, address the constitutionality of what it called the state's "mechanism of initiative petition." Id. Instead, the court was concerned

with the possibility that federal regulation of the petition circulation involved in the process might impinge upon the initiative supporters' freedom of speech and political association. The "governmental hindrance" referred to in Delgado is not the state's regulation of its initiative process in general but rather burdens on the petition circulation aspect of that process in particular. [FN8]

Biddulph mistakenly focuses on the following language in Delgado: "The state cannot impede or diminish [the initiative] process so long as it reserves the right of initiative to the people." Id. at 1496 (citing Meyer, 426 U.S. at 424, 108 S.Ct. at 1893). This language only makes sense in the context in which it was written, though. The quoted sentence is not from the portion of the opinion addressing the possible First Amendment implications of applying the Voting Rights Act to initiative petition circulation. Rather, the court uses this language in a section in which it describes Florida's initiative regulations as "limited ministerial duties." The court reasoned in this section that Florida's limited role in writing and circulating petitions indicated that, in Florida, petition circulation was a private political action rather than a state action. As a result, the petition materials were not "provided" by the state and, therefore, were not subject to the two-language requirement of the Voting Rights Act. This has nothing to do with the free speech implications of the state initiative mechanism.

That the Delgado court did not mean to impose First Amendment limitations on how Florida structured its initiative scheme is evidenced by the fact that the court explicitly recognized that Florida did impose regulations on its initiative process; in fact, the court noted most of the regulations which are discussed in Part II of this opinion. Delgado, 861 F.2d at 1496. The court also recognized the legitimate purpose served by Florida's

initiative regulations: "The state's responsibility is to ensure that the petition meets the requirements of law and will fairly present the proposition that may or may not be placed before the electorate." Id. at 1497. The court also stated, "The state's sole concern is a fair presentation on the ballot in accordance with state law." Id. at 1498 (emphasis in original).

Delgado simply stands for the proposition that a state cannot impede the petition circulation process as Colorado did in Meyer or as the two- language requirement might have in Delgado itself. As the Delgado court characterized Meyer, "The United States Supreme Court recognized that circulation of a petition involves activity protected as core political speech. Meyer, supra, 426 U.S. at 422, 108 S.Ct. at 1892." Delgado, 861 F.2d at 1498. Delgado cannot be read to mandate heightened First Amendment scrutiny of every restriction a state places on its own initiative process.

3. Strict Scrutiny and a State's Initiative Process

[9] Meyer and Delgado represent constitutional limitations on the generally broad power of states to institute procedures governing their own initiative processes--should they choose to create such processes in the first place. Nevertheless, as we have made clear, states maintain broad discretion in fashioning initiative mechanisms: The rights [to place an initiative on the ballot] derive from wholly state- created procedures by which issues that might otherwise be considered by elected representatives may be put to the voting populace. The state, having created such a procedure, retains the authority to interpret its scope and availability. Clearly, appellants can claim no constitutionally-protected right to place issues before the Florida electorate; any opportunity to do so must be subject to compliance with state constitutional requirements. Gibson v. Firestone, 741

F.2d 1268, 1273 (11th Cir.1984), (rejecting initiative sponsors' arguments that Florida court proceeding excluding initiative proposal from ballot was in violation of sponsors' voting, due process, equal protection, and contract rights), cert. denied, 469 U.S. 1229, 105 S.Ct. 1230, 84 L.Ed.2d 367 (1985).

[10] We hold that a state's broad discretion in administering its initiative process is subject to strict scrutiny only in certain narrow circumstances. We obviously would be concerned about free speech and freedom-of-association rights were a state to enact initiative regulations that were content based or had a disparate impact on certain political viewpoints. We also would be troubled were a state to apply facially neutral regulations in a discriminatory manner. See Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 297 (6th Cir.1993) (holding that the First Amendment Free Speech Clause does not constrain a state's ability to regulate its own initiative process as long as the state does not elect or enforce initiative procedures in a discriminatory or content-based manner). Nor, as Meyer held, could a state impermissibly burden the free exchange of ideas about the objective of an initiative proposal. [FN9] Most restrictions a state might impose on its initiative process would not implicate First Amendment concerns.

The restriction at issue in this case is not subject to strict scrutiny. Biddulph does not contend that Florida's procedures disparately impact a particular viewpoint or are content-based. He does not argue that Florida discriminatorily applied its initiative regulations. Nor does he complain that the state burdened the exchange of ideas with respect to the objective of his initiative proposal. Rather, Biddulph solely contends that Florida's process is burdensome because it is

unpredictable and imposes unnecessary costs on initiative sponsors. [FN10] But the Constitution does not require Florida to structure its initiative process in the most efficient, user-friendly way possible. The facts and arguments presented here do not require us to apply strict First Amendment scrutiny to Florida's initiative process.

V. Conclusion

Although there are some scenarios in which a First Amendment challenge seeking strict scrutiny of a state's initiative process would survive a motion to dismiss, Biddulph has failed to make out such a viable claim.

AFFIRMED. [FN11]

FN1. The Florida Supreme Court denied Biddulph mandamus relief on the same federal claim he raises here. The existence of this state court ruling calls our subject matter jurisdiction into question under the Rooker-Feldman abstention doctrine. See District of Colombia Court of Appeals v. Feldman, 460 U.S. 462, 480-82, 103 S.Ct. 1303, 1314-15, 75 L.Ed.2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). Although no party has raised this issue, we cannot proceed without subject matter jurisdiction. The Rooker-Feldman doctrine, based on statutory jurisdictional limitations, teaches us that federal district courts have no authority to review final judgments of state courts. The rule applies "not only to claims actually raised in the state court, but also to claims that were not raised in the state court but are 'inextricably intertwined' with the state court's judgment." Powell v. Powell, 80 F.3d 464, 466 (11th Cir.1996). This circuit recognizes an exception to the Rooker-Feldman doctrine, however, when the plaintiff has no "reasonable opportunity to raise his federal claim in state proceedings." Id. at 467. (citing Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir.1983), cert. denied,

467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984)). That exception applies here. In Florida, mandamus is not awarded as a matter of right but at the court's discretion, Somlyo v. Schott, 45 So.2d 502, 504 (Fla.1950), and only upon a showing of a clear legal right to performance of an indisputable legal duty, State ex rel. Eichenbaum v. Cochran, 114 So.2d 797, 800 (Fla.1959). Because the Florida Supreme Court has strictly limited authority to grant a writ of mandamus to those cases where there is a clear right to performance of an indisputable legal duty, the state mandamus proceeding did not afford Biddulph the kind of "reasonable opportunity" to raise his federal claim that would preclude our independent review of that claim. The Florida Supreme Court's refusal to grant a writ of mandamus means only that the state court failed to find it clear and indisputable either that the state initiative system violated the First Amendment or that the state initiative process had to be altered in the manner Biddulph requested in order to comply with the First Amendment. In fact, Florida courts could probably never grant mandamus relief for such a novel (and therefore disputable) federal constitutional claim. See, e.g., Kane Homes, Inc. v. City of North Lauderdale, 418 So.2d 451, 453 n. 3 (Fla. 4th Dist.Ct.App.1982) (mandamus will apply "when the law prescribes and defines [a duty] with such precision and certainty as to leave nothing to the exercise of discretion or judgment") (quoting State ex rel. Zuckerman-Vernon Corp. v. City of Miramar, 306 So.2d 173, 175 (Fla. 4th Dist.Ct.App.1974), cert. denied, 320 So.2d 389 (Fla.1975)).

FN2. Biddulph argues that the state must "narrowly tailor any restrictions it imposes upon" the initiative process and "avoid unnecessary impediments." Appellant's Brief at 36. Biddulph further contends that

Florida "may not abridge First Amendment rights without establishing compelling necessity." Id. at 43.

FN3. Biddulph claims that in collecting the 400,000 signatures required he expended thousands of hours of effort and hundreds of thousands of dollars and that he paid the supervisors of elections more than $25,000 to verify the signatures.

FN4. See Emily Calhoun, "Initiative Petition Reforms and the First Amendment," 66 U.Colo.L.Rev. 129 (1995) (arguing that Madison's version of the petition right preserved direct access to government but gave representatives ultimate power to reject petitions on the theory that representatives have to exercise judgment on behalf of the common good, not factions, even if those factions constitute a majority); see also Norman B. Smith, " 'Shall Make No Law Abridging ...': An Analysis of the Neglected, But Nearly Absolute, Right of Petition," 54 U.Cin.L.Rev. 1153, 1154 (1986) (noting that interests served by petition right are keeping government informed of peoples' needs and of peoples' reaction to government actions); Stephen A. Higginson, Note, "A Short History of the Right to Petition the Government For the Redress of Grievances," 96 Yale L.J. 142, 156 (1986) (explaining that in drafting Bill of Rights, Congress defeated amendment giving people the right to instruct their representatives but in doing so expressly affirmed Congress' duty to consider citizen communications, like petitions).

FN5. In Delgado v. Smith, 861 F.2d 1489 (11th Cir.1988), cert. denied, 492 U.S. 918, 109 S.Ct. 3242, 106 L.Ed.2d 589 (1989) (Fay, J.), a panel of this circuit in dicta appears to have approved of a district court's statement

that initiative "petitions represent the exercise of individuals of their fundamental rights to express themselves freely and to petition the government for redress of grievances...." Id. at 1498-99. This statement, quoted in passing and not necessary or even relevant to the panel's decision in the case (as discussed infra), does not constitute a holding of this court. Biddulph acknowledges that the right to propose legislation by citizen initiative is not guaranteed by the United States Constitution but is a state-created right. Thus, the sort of petitioning occurring in the citizen initiative is not guaranteed by the petition clause in the first place. This alone should indicate that the guarantee found in the Petition Clause is not implicated by the regulation of a citizen initiative.

FN6. Colorado argued that because the power to present amendments through voter initiative is a state-created right and not a federal right, the state could freely impose limitations on the exercise of that right. Id. at 423, 108 S.Ct. at 1893. The Court rejected this argument, however, reasoning that the power to ban initiatives entirely (and therefore, by analogy, to regulate them) does not include "the power to limit discussion of political issues raised in initiative petitions." Id.

FN7. The Meyer Court noted that the Colorado measure at issue there burdened political speech partly by making "it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Id. at 422, 108 S.Ct. at 1892. Although this language out of context might suggest that strict scrutiny be applied to statutes burdening a sponsor's ability to place a measure on the ballot, Meyer, read as a whole, does not lead to that conclusion; the Court

established an explicit distinction between a state's power to regulate the initiative process in general and the power to regulate the exchange of ideas about political changes sought through the process. The Court only addressed the constitutionality of the latter. See discussion supra at n. 6.

FN8. Delgado also cited Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), and Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), for the proposition that the rights of free speech and association are implicated where state statutes impose restrictions on private political activity. Neither of these cases would mandate application of strict scrutiny in this case, however. In Williams the Supreme Court struck down as violative of equal protection an Ohio statute which required any new political party seeking a position on the ballot in a presidential election to obtain petitions signed by 15% of the qualified electors who voted in the last gubernatorial election. The statute at issue in that case was flawed because it infringed both First Amendment and equal protection rights. The Court characterized the Ohio statute as a severe restriction that favored the two established political parties over new parties struggling for existence. 393 U.S. at 31, 89 S.Ct. at 10. Accordingly, the Court held that the state failed to show any compelling interest for placing such an unequal burden on minority groups where important First Amendment rights were at stake. Id. at 31, 89 S.Ct. at 11. In contrast, Biddulph does not allege that Florida's initiative process discriminated against or even disparately impacted a minority party or political view. In Tashjian, the Court struck down a Connecticut statute that required voters to be registered members of a party in order to vote in that party's

primary. The Connecticut Republican Party had declared its primary open to independent voters. The Supreme Court held that the statute burdened the Connecticut Republican Party's right to associate with others for political ends and applied strict scrutiny. 479 U.S. at 217-29, 107 S.Ct. at 550- 56. The statute at issue in Tashjian directly burdened the First Amendment rights of individuals to associate for political purposes. The regulations at issue here, in contrast, have no such direct effect on political association. The types of association and equal protection rights infringed by the statutes at issue in Williams and Tashjian are not raised by Biddulph's claim. Were these rights directly burdened, strict scrutiny indeed might apply.

FN9. The Supreme Court has applied strict scrutiny to at least two other state statutes that impermissibly burdened speech about changes at issue in referendum elections. See McIntyre v. Ohio Elections Comm'n, --- U.S. ----, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (holding Ohio statute that prohibits the distribution of anonymous campaign literature unconstitutional); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (holding statute prohibiting corporations from making contributions or expenditures for the purpose of affecting referendum elections unconstitutional).

FN10. Biddulph has not requested that we weigh state interests against the voters' burden--the case-by-case balancing test called for by the Supreme Court in the ballot access cases. See Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). That test is not appropriate here. Unlike the petitioners in Celebrezze and Takushi, Biddulph has not

raised a right-to-vote or freedom-of-association claim. Additionally, this case involves an initiative's access to the ballot, not a candidate's. This difference is material because, as noted earlier, the right to place an initiative on the ballot is a right created by the state.

FN11. Appellant's request for oral argument is denied. Appellee's "Suggestion of Mootness," construed as a motion to dismiss this case as moot, is denied.

APPENDIX B

Order Denying Rehearing

APPENDIX B

IN THE UNITED STATES COURTOF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 95-3131

DAVID BIDDULPH,
TAX CAP COMMITTEE,
Plaintiffs-Appellants,
Appellants,

versus

SANDRA MORTHAM, Florida
Secretary of State,
Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19_, ___F.2d__).

Before: TJOFLAT, Chief Judge, KRAVTICH and HATCHETT, Circuit

Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[Phyllis Kravitch]
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

[Order entered October 1, 1996 by date stamp.]

APPENDIX C

District Court Order

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DAVE BIDDULPH and
TAX CAP COMMITTEE,

Petitioners,

vs.
TCA 94-40534-WS

SANDY MORTHAN, SECRETARY
OF STATE OF FLORIDA,

Respondent.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

The petitioners in this case challenge the procedures that persons must use in Florida to get citizen-proposed constitutional amendments on the ballot. Before the court at this time are the respondent's motion to dismiss for failure to state a claim (doc. 12) and the petitioners' response thereto (doc. 13).

I.

Under Florida law, the "people" have the power to propose amendments to the state constitution. Fla. Const.

art. XI, § 3. This right to initiate constitutional amendments is not a right guaranteed under the United States Constitution but is a right created by Florida law, which, up until the general election in November of 1994, provided as follows:

> The power to propose the revision of amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the past preceding election in which presidential electors were chosen.

Fla. Const. art. XI, § 3 (1993). The initiative provision was changed in 1994 by Florida voters, a majority of whom approved a constitutional amendment that excepted from the single-subject requirement of article XI, section 3, any revisions or amendments limiting the power of government to raise revenue. See Fla. Const. art. XI, § 3 (1995) (providing that revisions or amendments proposed by the people, except for those limiting the power of government to raise revenue, must embrace but one subject).

Under Florida law, before an initiative petition may be circulated for signatures, the sponsor of a constitutional amendment must register as a political committee and must submit the petition form to the Secretary of State for approval. Fla. Stat. § 100.371(3). The Secretary of State, through the Division of Elections, reviews the sufficiency of the petition's format but does not review the legal sufficiency of the text of the proposed amendment. Fla. Admin. Code Ann. r. 1S-2.009(1).

If deemed sufficient by the Division of Elections, the proposed initiative amendment may be circulated for signatures. Fla. Admin. Code Ann. r. 1S-2.009(2). Once signed, a petition must be submitted to the appropriate supervisor of elections "for verification as to the number of registered electors whose valid signatures appear thereon." Fla. Stat. § 100.371(4) (1995). Upon payment of a fee equal to the sum of 10 cents per signature checked, Fla. Stat. § 99.097(4) (1995), the supervisor of elections must promptly verify the signatures and, upon completion of verification, submit to the Secretary of State a certificate indicating "the total number of signatures checked, the number of signatures verified as valid and as being of registered electors, and the distribution by

congressional district." Fla. Stat. § 100.371(4) (1995). If, after compiling the total number of verified signatures, the Secretary of State determines that a political committee has obtained the constitutionally required number of signatures, a certification of ballot position is issued to the sponsor of the initiative. Fla. Admin. Code Ann. r. 1S-2.0091(4).

The Secretary of State must submit the sponsor's initiative petition to the Attorney General, if, and when, a sponsor has (1) registered as a political committee, (2) submitted the ballot title, substance, and text of the proposed revision or amendment to the Secretary of State, and (3) obtained a letter from the Division of Elections "confirming that the sponsor has submitted to the appropriate supervisors for verification, and the supervisors have verified, forms signed and dated equal to 10 percent of the number of electors statewide and in at least one-fourth of the congressional districts required by s. 3, Art. XI of the State Constitution." Fla. Stat. § 15.21. Within 30 days after receipt of an initiative petition from the Secretary of State, the Attorney General must petition the Florida Supreme Court for an advisory opinion regarding "the compliance of the text of the proposed amendment or revision with [the single-subject requirement of] s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161." Fla. Stat. § 16.061 (1995); see also Fla. Const. art. IV, § 10 (requiring the attorney general to request the opinion of the justices of the supreme court as to the validity of any initiative petition); Fla. Stat. § 101.161 (1995) (requiring a ballot title not exceeding 15 words in length and a clear and unambiguous ballot summary, not exceeding 75 words in length). If the supreme court finds either that the proposed amendment

violates the single-subject requirement or that the proposed ballot title and summary are unclear or ambiguous, the supreme court will order removal of the initiative petition from the ballot. See, e.g., In re Advisory Opinion, 632 So.2d 1018 (Fla. 1994) (ordering removal of an invalid initiative petition from the ballot.

II.

It is alleged in this case that Dave Biddulph, a Florida citizen and taxpayer, was the primary proponent of an initiative petition to amend the Florida Constitution to prohibit the imposition of new taxes except upon voter approval. Amended Compl. at 5. As required under Florida law, Biddulph formed and registered a committee, known as the Tax Cap Committee ("TCC"), to serve as sponsor for his initiative petition, called the Voter Approval of New Taxes Initiative. Amended Compl. at 6.

It is further alleged that, on August 3, 1993, the Secretary of State approved the Voter Approval of New Taxes initiative as to format. Amended Comp. at 28. Upon receiving the Secretary of State's approval, TCC and Biddulph circulated the approved initiative and obtained more than 400,000 signatures on petitions to place the initiative on the November 1994 ballot.[1] Amended Compl. at 29. In July 1994, after the signed

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[1] Although the November 1994 election for which the petitioners were seeking ballot placement has long since passed, the court notes that the action is not moot because the controversy is one capable of repetition, yet evading review.

petitions were submitted to the appropriate supervisors of elections for verification, and after the supervisors of elections had transmitted the appropriate certificates to the Division of Elections, the Voter Approval of New Taxes initiative was certified for ballot position for the general election to be held in November 1994. Amended Compl. at ¶ 33.

It is next alleged that, after the initiative was certified for ballot position, the Secretary of State submitted the initiative to the Florida Attorney General, who, in turn, submitted the initiative to the Florida Supreme Court for an advisory opinion as to the initiative's validity. Amended Compl. at ¶¶ 34-35. On October 4, 1994, the supreme court issued an advisory opinion wherein it explained that the Voter Approval of New Taxes initiative was not in compliance with the ballot title and summary requirements of section 101.161. Amended Compl. at ¶ 47.

Finally, it is alleged that on October 5, 1994, the Secretary of State directed the Florida supervisors of elections to remove the Voter Approval of New Taxes initiative from the ballot. Amended Compl. at ¶ 61. On October 14, 1994, TCC and Biddulph filed a petition for writ of mandamus to Jim Smith, as Secretary of State, in the Supreme Court of Florida. Biddulph and TCC wanted the supreme court to order the respondent to revise, and to eliminate the deficiencies in, the ballot title and summary of the Voter Approval of New Taxes initiative and to place the initiative on the ballot, as revised, for the November 1994 general election. Amended Compl. at ¶ 62. When the supreme court summarily denied their petition for writ of mandamus, TCC and Biddulph filed their complaint in this court.

III.

The petitioners challenge as unconstitutional the procedures imposed by rule and statute upon Florida's initiative process.[2] Specifically, the petitioners claim that, by providing no mechanism for early review of a petition's legal sufficiency and/or by providing the supreme court with no authority to independently rewrite an initiative's ballot title and summary to conform to law, Florida's initiative process forces initiative sponsors to risk large sums of money, time, and effort on initiatives for which ballot placement may be ultimately disallowed. According to the petitioners, Florida's initiative process thus impermissibly infringes upon the First and Fourteenth Amendment rights of initiative sponsors.

Of some interest in this case is what the petitioners to not contend. The petitioners, for example, do not contend that the right to place a citizen initiative on the ballot is a right guaranteed by the First Amendment. It is not. Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291 (6th Cir. 1993); see also Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L.Ed.2d 425 (1988) (recognizing that the power of the initiative is a state-created right). Neither do they contend

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[2] While the right to propose a constitutional amendment through the initiative process is a state-created right and not a right guaranteed by the federal constitution, federal jurisdiction nonetheless exists where, as here, a plaintiff contends that the initiative process prescribed by a state offends rights that are guaranteed by the federal Constitution.

that a violation of the federal Constitution occurs whenever a citizen initiative is kept off the ballot for non-compliance with single-subject or ballot title and summary requirements. It does not. See Taxpayers United for Assessment Cuts v. Austin, 994 F.2d at 297 (recognizing that, because states have an interest in protecting the integrity of their initiative processes, nondiscriminatory and content-neutral restrictions on ballot access are permissible). They also do not contend (1) that Florida's initiative process was, or will be, applied to them in a discriminatory manner; (2) that Florida's system restricts the means by which they can advocate their proposals for constitutional change; or (3) that Florida's system for checking the legal sufficiency of initiatives is anything other than content-neutral.

In essence, what the petitioners do contend is that Florida's initiative system is inefficient. That inefficiency, they suggest, subjects initiative sponsors to risks and delays that could, and should, be eliminated. The Constitution does not require, however, that Florida's initiative system be the "best" system, the most efficient system, the least expensive system, or the least-troublesome-to-sponsors system. Because this court has found nothing in the Constitution that would protect an initiative sponsor's right to avoid unnecessary expense or delay in getting an initiative on the ballot, the court concludes that the petitioners have failed to state a claim upon which relief may be granted.

Accordingly, it is ORDERED:

1. The respondent's motion to dismiss (doc. 12) is GRANTED.

2. The petitioners' motion for summary judgment (doc. 14) is DENIED.

3. The petitioners' motion for oral argument (doc. 17) is DENIED.

4. The petitioners' motion for status conference (doc. 20) is DENIED.

5. The petitioners' amended complaint and this action are DISMISSED for failure to state a claim.

6. The clerk shall enter judgment accordingly.

DONE AND ORDERED this 14th day of July, 1995.

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE